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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 441

ALONSITA WALKER, ET AL.,
Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of Maryland, which affirms the decree of the Circuit Court for Talbot County, Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix B, infra, p. 16) is reported at 116 A. 2d 393. The opinion of the Circuit Court for Talbot County, Maryland, was not reported, but is set forth on pages 23 to 37 of the Appellants' Appendix before the Court of Appeals of Mary-

land, nine copies of which Appellants' Appendix have been filed in accordance with paragraph 4 of Rule 21 of this Court. The part of said opinion pertaining to the questions involved herein is printed as Appendix A, infra, p. 13.

JURISDICTION

The judgment of the Court of Appeals of Maryland (Appendix B, infra, p. 16) was rendered on July 27, 1955. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Is a zoning ordinance unconstitutional in so far as it applies to a group of properties when it requires the use of those properties for purposes which are impractical and unprofitable and denies the use of those properties for purposes for which they are most peculiarly suitable and highly profitable, when the profitable use of the property would cause no disadvantage or loss to the surrounding properties or to the public?

2. Where a court specifically finds from the evidence that property is peculiarly adaptable as a deep water port and a a site for heavy industry, can it disregard this fact on the basis that it was not known to the zoning officials at the time of the enactment of the zoning ordinance?

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Constitutional provisions which are relevant to the decision of this case are Amendments XIV and V of the United States Constitution, which provide in pertinent part:

Section 1, Amendment XIV — "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

Amendment V — "* * * nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The case also involves the Talbot County Zoning Ordinance (App. 326).*

STATEMENT

Petitioners own six parcels of land consisting of approximately 836 acres of land. They filed suit against the Board of County Commissioners, Planning and Zoning Commission and Appeal Board for the Planning and Zoning Commission of Talbot County for a declaratory decree and injunction, alleging that the Talbot County Zoning Ordinance "deprives the Plaintiffs of the rightful use of their property without due process of law, takes said property without compensation and denies to the Plaintiffs the equal protection of the laws in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and of Article 23 of the Declaration of Rights of the Constitution of Maryland, and therefore, said Ordinance is unconstitutional and void in so far as it affects the Plaintiffs' properties" (App. 8, 9). The bill of complaint also alleged that "said ordinance as applied to the Plaintiffs' properties is not a proper exercise of the police power and is arbitrary, unreasonable, oppressive, confiscatory, discriminatory and illegal and that it is without any reasonable relation to the public health, safety or welfare" (App. 8). Other attacks were made upon the ordinance, but since they did not involve any federal question, they are being disregarded in this petition.

Petitioners' property was included in an agricultural zone instead of an industrial zone in disregard of its peculiar

* Figures in parentheses preceded by "App." are references to Petitioners' Appendix in the Court of Appeals of Maryland.

suitabililty for industrial purposes. The property consists of unprofitable farmland (App. 210, 298), poor marshland (App. 43, 211, 212, 298) and cut over woodland (App. 296, 297). The income from the land is less than the amount of taxes (App. 211). The land has been eroding, so that a quarter mile of waterfront has eroded 100 feet in the last 25 years (App. 211, 212). No crops are grown on the farm owned by the Petitioner Florence Lowe, consisting of 257 acres (App. 215, 216) and it has not been farmed for at least 4 or 5 years (App. 216). The properties are peculiarly suitable for industry and would be highly valuable for such use (App. 157, 158, 165, 211, 282). Petitioners produced eminent expert witnesses to prove that these properties make up the most suitable site for general modern industry on the Atlantic seaboard which has not already been occupied by industry or the military services (App. 160, 56). The depth of the water and nature of the shore line is such that it is economically practical to construct a large deep water port with sufficient depth to accommodate the largest ocean going vessels (App. 157, 158, 167, 196). Water tests on the properties showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location (App. 181) without interfering with sources of water now used in the area (App. 180). Railroad facilities are in close proximity to the site and could be extended to an industrial plant at a reasonable cost (App. 76). The Department of Defense has issued a certificate of necessity authorizing the construction of the port and declaring it to be essential for national defense (App. 199). *The opinion of the trial Court stated that Appellants established these facts by the evidence* (Appendix A, infra p. 14), in the following language:

> "The plaintiffs produced evidence which established that the properties in question, especially the Walker

properties, could by the expenditure of five million dollars for dredging and fill, be developed into a large deep water port with sufficient depth to accommodate the largest ocean going vessels. That the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available. That a corporation known as Port of Chesapeake Authority, Inc., which was formed subsequent to the adoption of the final ordinance, was willing and able to construct such a port. That water tests made on the Walker farms showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location. That railroad facilities were existent in close proximity to the farm and could be extended to an industrial plant at a reasonable cost. That a certificate has been issued by the Department of Defense authorizing the construction of the proposed port."

An industrial survey and report made by the Planning and Zoning Commission after the adoption of the ordinance reported many of these and other factors to show excellent opportunities in Talbot County for industry (App. 327). The evidence of the peculiar suitability of the property for industry was uncontradicted. Petitioners produced a real estate developer and broker who testified that the location of industry on their properties would very much increase their value (App. 222), would increase the value of the surrounding property very much (App. 222) and would benefit nearby towns such as Easton and St. Michaels (App. 222, 223). Petitioners also showed that it would be of advantage to the residents of the area for an industry to locate there, for it would give employment opportunities to the young people who are being forced to leave the county to seek employment (App. 214, 219, 263). It was also shown

that the area contains a labor supply suitable for industry (App. 212, 213, 219).

Almost all the people in the large district which is one of the five districts of the county were strongly in favor of industrialization (App. 109, 255). The Commissioners of the nearby town of St. Michaels notified the County Commissioners that they favored an oil company locating on the Petitioners' property (App. 91). The Planning and Zoning Commission sponsored a visit to two oil refineries where they learned that a properly planned and operated oil refinery would not permit any pollution of air or water (App. 110), and that there was no damage to surrounding farm lands (App. 220, 221).

Even without an oil refinery, the property is peculiarly suitable for a deep water port facility which would profitably handle general cargo and commodities (App. 191, 196). It is for this latter purpose that the project was officially declared to be necessary in the interest of national defense.

The Circuit Court for Talbot County decreed the zoning ordinance to be constitutional for the reason that "the peculiar factors which make the plaintiffs' property adaptable as a deep water port or a site for heavy industry were neither known nor by the conduct of a reasonable land use study should have been known to the zoning authorities at the time of the adoption of the final ordinance classifying the plaintiffs' property as farming. It would seem clear that the reasonableness of classifying this property as agricultural must be determined in the light of facts known or those which should have been known to the authorities on May 16, 1953 and not in the light of factors made known since that date. By this rule the court holds that the classification of the Plaintiffs' property as agricultural on May 16, 1953 was reasonable and in the interest of the health,

safety, morals and general welfare of the public of Talbot County." (Appendix A, infra p. 15). Th Court of Appeals affirmed the decision of the Circuit Court and ruled that the Zoning Ordinance did not violate the Federal Constitution in its application to the Petitioners' property (Appendix B, infra p. 33).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of Maryland is in direct conflict with this Court's decision in Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842 on the exact question presented; i. e., the unconstitutionality of a zoning ordinance insofar as it applies to certain property when the uses which the ordinance permits on the property "is of comparatively little value." The decision below also conflicts squarely with the cases of Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N. E. 2d 315; Tower Cabana Club v. City of Chicago, 123 N. E. 2d 834; Comer v. City of Dearborn, Mich., 70 N. W. 2d 813; City of West University Place v. Ellis, Tex., 134 S. W. 2d 1038; and Vernon Park Realty v. Mount Vernon, 307 N. Y. 493, 121 N. E. 2d 517. The reason given by the Circuit Court for Talbot County for its decision, that the reasonableness of the regulation must be determined in the light of facts known at the time of enactment and not in the light of factors made known later, is repugnant to the decision of this Court in Nashville, Chattanooga & St. Louis Railway v. Walter, 294 U. S. 405, 415, 55 S. Ct. 486, 488, 79 L. Ed. 949, 955, and Abie State Bank v. Bryon, 282 U. S. 765, 776, 51 S. Ct. 252, 257, 75 L. Ed. 690, 701.

1. In the Nectow Case, which has been used as a guidepost by state courts and which this Court has not seen fit to change in 27 years since it was decided, a zoning ordinance was held to be in violation of the Fourteenth Amend-

ment to the Federal Constitution in so far as it restricted the plaintiff's property to residential uses since "no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property" and "the locus is of comparatively little value for the limited uses permitted by the ordinance". In the case now before this Court, the property not only fails to bring an adequate return on the investment as zoned, but it operates at a loss because the income from the land is less than the amount of taxes (App. 211) and a substantial part of the property is swampland and cut over woodland and therefore is useless except for industrial purposes.

The value of the Walker property, consisting of 640 acres, was stated to be $340,000 for use as a port facility, which amounts to over $531 an acre (App. 190). The marshland, on the other hand, when not used for industrial purposes, was valued at $10 an acre (App. 298).

The prohibition of the use of this property industrially is more unreasonable than the residential zoning of the land in the case of Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N. E. 2d 315, in which the highest and best use of the land for industrial purposes was approximately $225,000, whereas it was only worth approximately $50,000 for residential use. It was held that the industrial zoning would be highly destructive of value, that no gain to the public would result compared to the hardship imposed and was therefore manifestly unreasonable and unconstitutional because of its confiscatory effect.

In a very recent case, Tower Cabana Club v. City of Chicago, 123 N. E. 2d 834, the Supreme Court of Illinois held the restriction of property to single-family residences

to be "unreasonable and void, having the effect of depreciating the values of the property without correspondingly benefitting the public generally" where a real estate appraiser estimated that the use of the property for single-family residences would make them worth $40 per foot upon the expenditure of $35 per foot, whereas if restrictions were removed, the property in its present state would be worth $20 per foot.

For similar reasons, zoning ordinances were held to be arbitrary, unreasonable and void as to certain properties in Comer v. City of Dearborn, Mich., 70 N. W. 2d 813, and City of West University Place v. Ellis, Tex., 134 S. W. 2d, 1038.

The Court of Appeals of Maryland took the position that if the property can possibly be used in the manner in which it is zoned, the zoning can not be disturbed, without consideration of the fact that the use of part of the property for farming is unprofitable and that the remainder of the property is poor marshland and cut-over woodland. However, in the recent case of Vernon Park Realty v. Mount Vernon, 307 N. Y. 493, 121 N. E. 2d 517, 520, it was held that where zoning "precludes the use for which it is most readily adapted", it is "so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process and, as such, are invalid, illegal and void".

Petitioners consider it highly significant in this case that there was no evidence presented to show that the industrial use of the property in question would harm or inconvenience any of the surrounding property or the public generally. The only witness who was produced for such purpose testified that the immediate use of the industrial zoning of the property would be a depreciation of the values on

residential properties in the immediate area when offered as agricultural properties and pleasant places to live, but he then admitted that when industry appeared on the scene and a new market was opened it would make the surrounding property of even greater value (App. 300, 301).

At least an indication that the people in the area do not consider the agricultural zoning of the property to have any reasonable relation to the public health, safety or welfare is the fact that 152 property owners of Talbot County and an organization of over 600 property owners and residents of the District where the property lies intervened as parties plaintiff. The defendants were only able to muster five husbands and wives and one additional property owner who intervened as parties defendant. The defendants also admitted and their minutes of a public meeting show that the "people of Bay Hundred were strongly in favor of industrialization as means of improving their standard of living" (App. 109, 255).

2. The Circuit Court for Talbot County found that the property was peculiarly adaptable as a deep water port and a site for heavy industry but ruled that this was not known at the time of the enactment of the zoning ordinance and therefore could not be considered. (Appendix A, infra p. 15). This ruling was clearly in opposition to the statement of Chief Justice Hughes in Abie State Bank v. Bryon, 282 U. S. 765, 776, 51 S. Ct. 252, 257, 75 L. Ed. 690, 701:

> "A police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation".

Also, in Nashville, Chattanooga & St. Louis Railway v. Walter, 294 U. S. 405, 415, 55 S. Ct. 486, 488, 79 L. Ed. 949, 955, the Supreme Court of Tennessee refused to consider evidence of changed economic and transportation conditions

during the ten years following the enactment of a state tax on railroads for one half the cost of separating grade crossings on the theory that they could only consider the constitutionality of the statute at the time of its passage. This Court ruled to the contrary. Mr. Justice Brandeis delivered the opinion of the Court, which said:

> "A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be executed arbitrarily or unreasonably."

The granting of certiorari will prevent a grievous and unnecessary wrong. The uncontradicted evidence establishes that Petitioners' properties consist of unprofitable farmland, useless marshland and cut over woodland, that the properties are peculiarly suitable for industry and would be highly valuable as such and that the use of the properties for industry will increase the value of surrounding property. The agricultural zoning of the properties therefore deprives Petitioners of the reasonable use thereof without due process of law and is unconstitutional. Such zoning not only causes extreme hardship to Petitioners but also constitutes a loss to the community, a waste of precious natural resources, a hindrance to progress and an interference with a project which has been officially declared by the Office of Defense Mobilization to be necessary for national defense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the Circuit Court for Talbot County

Chancery No. 3367

Alonsita Walker, et al., Plaintiffs,

vs.

Board of County Commissioners of Talbot County, et al., Defendants.

OPINION OF THE COURT

(Filed March 29, 1955)

This suit is instituted by property owners of the Bay Hundred District of Talbot County for a declaratory decree in respect to the general zoning ordinance adopted on May 16th, 1953 by the Board of County Commissioners for Talbot County. The bill prays that the ordinance be declared invalid and unconstitutional as a whole or in the alternative insofar as it affects the plaintiffs' properties and that an injunction be issued restraining its enforcement. The validity of the ordinance is challenged on three grounds; first, that the enactment procedure employed did not comply with the mandatory requirements of the enabling legislation; second, that the provisions of the ordinance itself did not comply with the enabling act (Article 66B of the 1951 Code) nor fulfill the requirements of a valid zoning ordinance; and thirdly, that the properties of the plaintiffs were zoned agricultural rather than industrial in disregard of their peculiar suitability for industrial purposes and the general welfare of the public.

* * * * * *

III. The third major ground assigned by the plaintiffs which they contend make the ordinance invalid and unconstitutional is that their properties are peculiarly suitable for industrial purposes and the zoning thereof as agricultural is arbitrary, capricious and unreasonable. The evidence presented in respect to this contention shows that the material facts concerning the plaintiffs' properties which were known to the zoning authorities on May 16th, 1953 when the ordinance was formally adopted were; (1) that the properties were farms used and occupied as such and had always been farms, and (2) that they were located in a farming neighborhood. The plaintiffs produced evidence which established that the properties in question, especially the Walker properties, could by the expenditure of five million dollars for dredging and fill, be developed into a large deep water port with sufficient depth to accommodate the largest ocean going vessels. That the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available. That a corporation known as Port of Chesapeake Authority, Inc., which was formed subsequent to the adoption of the final ordinance, was willing and able to construct such a port. That water tests made on the Walker farms showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location. That railroad facilities were existent in close proximity to the farm and could be extended to an industrial plant at a reasonable cost. That a certificate has been issued by the Department of Defense authorizing the construction of the proposed port. All of these factors however came to light through the surveys of experts employed by the property owners to make a special study of the property with a view to its adaptability for a deep water port and heavy industry and were not known to the zoning authorities at the time of the adoption of the zoning ordinance on May 16th, 1953. The question of whether such factors should have been known to the authorities at that time through

proper studies of land use and potential in the County presents the principal inquiry in respect of this contention. In attempting to properly zone the County the authorities employed an expert who conducted exhaustive studies and surveys for approximately eighteen months prior to the enactment of the final ordinance and advised with the authorities in respect thereto. Many public meetings were held at which the plaintiffs had full opportunity to bring the peculiar suitability of their property for industry to the attention of the authorities. In conducting a land use survey it seems reasonable that the property owners should bring to the attention of the zoning authorities peculiar factors of their property which are below the surface and therefore not visible upon ordinary examination of the area rather than to require the zoning authorities to test the depth of the off shore water and potential quantity of the under surface water throughout the County. Such a requirement of the authorities prior to enactment of a zoning ordinance would be practically prohibitive from the standpoint of expense, as well as the time involved in completing such a study. This court holds therefore that the peculiar factors which make the plaintiffs' property adaptable as a deep water port or a site for heavy industry were neither known nor by the conduct of a reasonable land use study should have been known to the zoning authorities at the time of the adoption of the final ordinance classifying the plaintiffs' property as farming. It would seem clear that the reasonableness of classifying this property as agricultural must be determined in the light of facts known or those which should have been known to the authorities on May 16, 1953 and not in the light of factors made known since that date. By this rule the court holds that the classification of the plaintiffs' property as agricultural on May 16, 1953 was reasonable and in the interest of the health, safety, morals and general welfare of the public of Talbot County. Even if the reasonableness of the classification were "fairly debatable" this court could not disturb it. See Zang v. Taylor, 102 A. 2nd 723; Wakefield v. Kraft, 202 Md. 136.

The validity of the final ordinance adopted May 16th, 1953 is presumed and the burden of proving the contrary is upon the plaintiffs; See Etchison v. Frederick City, supra; Spann v. Gaither, supra, Eastern Tar Products Corporation v. State Tax Comm., 176 Md. 290. The court finds the plaintiffs have failed to establish the invalidity of the ordinance by a preponderance of the evidence and therefore rules that it is a valid and constitutional exercise of the authority delegated by Article 66B.

The court will sign a declaratory decree in accordance with this opinion.

J. DEWEESE CARTER,

Judge.

APPENDIX B

In the Court of Appeals of Maryland

October Term, 1954

No. 180

Alonsita Walker, et al., Appellants,

vs.

Board of County Commissioners of Talbot County, et al., Appellees.

OPINION BY COLLINS, J.:

(Filed July 27, 1955)

This is an appeal from a decree denying the relief prayed in plaintiffs' bill of complaint.

Pursuant to Code, 1951, Article 66B, the County Commissioners of Talbot County, (the Commissioners), on May

16, 1953, adopted a zoning ordinance, (the Zoning Ordinance). The plaintiffs, appellants here, five property owners, as property owners filed an amended bill of complaint on February 21, 1955, against the Commissioners, the Planning and Zoning Commission, (the Commission), and the Appeal Board for the Commission, (Appeal Board), asking for a declaratory decree declaring the aforesaid Zoning Ordinance invalid and unconstitutional in its entirety; in the alternative that the Zoning Ordinance be declared invalid and unconstitutional insofar as it affects the property of the plaintiffs; that the defendants be enjoined from enforcing said Zoning Ordinance in the use of their properties for industrial purposes; and for other and further relief.

The decree declared that the Zoning Ordinance was valid, constitutional and in full force and effect; that the Commission is legally constituted and entitled to function under the provisions of Code, 1951, Article 66B, supra; that the Appeal Board was legally created and is legally constituted and entitled to function as such under the provisions of Article 66B, supra; and requiring appellants to pay the costs of the proceedings. From that decree appellants appeal here.

The bill of complaint alleges and the appellants claim that the Commission was not legally created. Article 66B, supra, Section 12, provides in part: "(Personnel of the Commission.) The Commission shall consist of five members, namely, a member of the Council and four persons who shall be appointed by the mayor, and confirmed by the council, if the mayor be an elective officer, otherwise by such officer as council may in the ordinance creating the Commission designate as the appointing power. All members of the Commission shall serve as such without compensation. The term of the *ex-officio* member shall correspond to his official tenure. The term of each member shall be five years or until his successor takes office, except that the respective terms of the five members first appointed shall be one, two, three, four, and five years."

By Article 66B, supra, Section 10, "mayor" is defined as "the chief executive of the political subdivision, whether the official designation of his office be Mayor, City Manager or otherwise." "Council" is defined as "the chief legislative body of the political subdivision." On August 14, 1951, the Commissioners unanimously passed Planning and Zoning Ordinance No. 1 creating the Commission and appointed five members: One, (Mr. Norman W. Harrington), for a term of one year; one for a term of two years; one for a term of three years; one for a term of four years; and one for a term of five years. They failed to name a member of the Commissioners to this Commission. It is conceded by the appellees that the Commission was originally improperly constituted. However, failure to appoint a proper Commission would not invalidate the Ordinance as a whole. Cf. *Bostock v. Sams*, 95 Md. 400, 418, 52 A. 665. Insofar as the Ordinance authorized the appointment of a Commission it could take effect at once, subject to the filling of vacancies by subsequent action of the "Mayor" and "Council". On February 13, 1952, Mr. Harrington, one of the original members of the Commission, upon entering military service was forced to resign. At that time it was discovered that a member of the Commissioners was not included on the Commission. The Commissioners then unanimously appointed Mr. Omer Dulin, the President of the Commissioners, to the Commission. Mr. Dulin was appointed to fill the unexpired term of Mr. Harrington, whose term being for one year, expired on August 14, 1952. Mr. Dulin served on the Commission as a hold-over member until his term expired as County Commissioner in 1954, when he was again re-elected a County Commissioner. He has continued to serve as a hold-over member up to the time of the hearing below. His term from his original appointment on February 13, 1952, has in fact corresponded with his official term as a member of the Commissioners since that time. In *Benson v. Mellor*, 152 Md. 481, 137 A. 294, a case involving the tenure of office of a County Commissioner, it was held that in the absence of a contrary intention incumbents in office rightfully hold over and perform the duties of their offices until the qualification of

their successors, although there may be no express provision in the law for it. We must, therefore, hold that the legislative intent that a member of the Commissioners be a member of the Commission was complied with on February 13, 1952.

Appellants contend that the appointments should have been made by the President of the Commissioners and confirmed by the Commissioners under Article 66B, Section 12, supra, and that under the Constitution of Maryland, Article 11A, Section 3, the President of the Commissioners is the chief executive officer of that body. The appointments were made and approved by the Commissioners when all members were present. If the President of the Commissioners had not agreed to those appointments, it is reasonable to assume that his disapproval would have been a matter of record. There is no record of his disapproval. From February 13, 1952, Mr. Dulin served with the other members of the Commission which is an indication of his approval of those members. We are of opinion that this was a sufficient compliance with the Enabling Act.

Appellants also complain because Mr. Norman Howeth resigned from the Commission on March 5, 1953, and his successor was not appointed until May 26, 1953. There is nothing in the record to show that the Commissioners did not act with reasonable promptness, under the circumstances, to fill the vacancy.

Appellants further alleged and contend that the Appeal Board was not legally created. Code, 1951, Article 66B, supra, Section 22, provides in part: "(Board of Appeals.) The council shall provide for the appointment of a Board of Appeals, * * * . The Board of Appeals shall consist of three members." The minutes of the Commissioners show that on September 8, 1951, the Commissioners appointed three members to the Appeal Board. The appellants contend that because these appointments were not made by the President of the Commissioners alone, the Appeal Board was not validly constituted. The testimony shows that all the Commissioners agreed to these appointments. Therefore, the President of the Commissioners agreed to

the appointments and they were confirmed by the council. As stated by the chancellor, it seems clear from the minutes of the Commissioners that each additional appointment was to replace a retiring member. There is no evidence that appellants ever appealed to this Appeal Board.

The appellants further contend that there was no preliminary report thereon by any Planning Commission prior to a final report by such Commission nor has there been any final report by any Planning Commission prior to the enactment of the Zoning Ordinance and that there were no hearings thereon. Code, 1951, Article 66B, supra, Sections 21(d) and 21(f) provides: "21(d) (Method of Procedure.) The council shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen (15) days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality. * * * 21(f) In order that the municipality may avail itself of the zoning powers conferred by this sub-title, it shall be the duty of the Planning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report and the council shall not hold its public hearings or take action until it has received the final report of such commission." Mr. Dulin testified that the Commission, of which he was a member, had a meeting on April 6, 1953, and on April 7th, Mr. Voshell, a member of the Commission, appeared before the Commissioners and reported to them about the meeting of the Commission on the previous evening. Mr. Voshell in his testimony read the following from the minutes of the meeting of the Commission of April 6, 1953: "The Commission reviewed the revised draft of the Ordinance of Talbot County, including the maps which

had been prepared at the request of the 'Citizens Committee for Talbot County Development'. The Commission tentatively approved these drafts, subject to further consideration when a public hearing is planned." He testified that he went before the Commissioners the next day and informally presented to them what the Commission thought desirable to present at the public hearing. He said that on April 7th he went over in complete detail with the Commissioners the proposed Ordinance, the maps and what the maps showed, and the Commissioners agreed that this would be presented at the public meeting. He told them when he thought this public meeting should be held and asked their concurrence. We are of opinion that the maps and proposed Ordinance showing the tentative zoning constituted the necessary preliminary report to the Commissioners. The Enabling Act, Section 21(f), supra, requires the Commission to recommend the boundaries of the districts and the appropriate regulations to be enforced therein. This preliminary report is to be submitted before a public hearing is held. We can find no provision for formal action of the Commissioners on that preliminary report or as to the form of that report. The maps and proposed Ordinance submitted appear to have been sufficient. Through the newspaper advertisement, which was published as hereinafter stated, and the reference therein to the maps and draft of the Ordinance, which were open for public inspection at the office of the Commission, the requirement for submitting the preliminary report to the public was met in that it was thus presented in usable, written form and served as a proper and adequate basis for discussion at that public meeting.

The exhibit shows that "once in each of one week beginning the 4th day of April, 1953", a notice of public hearing was published in the Easton Star-Democrat of Easton, Talbot County. This was a notice that a public hearing would be held in the Easton High School in Easton on Monday, April 27, 1953, "* * * for the purpose of presenting a draft of a master plan and zoning ordinance for all of Talbot County, prepared to meet specifications of the five-point program advanced by the Citizens Committee for Talbot